



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF GETİREN v. TURKEY

(Application no. 10301/03)

JUDGMENT

STRASBOURG

22 July 2008

FINAL

22/10/2008

This judgment may be subject to editorial revision.

In the case of Getiren v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Antonella Mularoni,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 1 July 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 10301/03) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Neytullah Getiren (“the applicant”), on 23 January 2003.

2. The applicant was represented by Mrs G. Tuncer, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 21 June 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant, Mr Neytullah Getiren, was a Turkish national who was born in 1959 and had been living in Bursa. By a letter dated 20 December 2004, the applicant’s representative informed the Court that the applicant had died on 23 January 2003 and that his brother, Sedreddin Getiren, wished to pursue the application.

A. The applicant's arrest, detention in police custody and the medical certificates concerning his alleged ill-treatment

5. On 14 March 1999 the applicant was taken into custody by police officers from the anti-terrorist branch of the Istanbul police headquarters during the course of a police operation carried out against the PKK (the Kurdistan Workers' Party, an illegal organisation) following the bombing of a shopping centre in Istanbul, the *Mavi Çarşı*, causing the death of thirteen persons.

6. According to the house search, arrest and seizure report signed by eight police officers and the seven persons who were arrested, including the applicant, the arrest took place in a flat raided by the police. During the arrest a physical struggle occurred between the police officers and the applicant as the latter attempted to escape.

7. On the same day at 6 p.m., the applicant was medically examined by a doctor, who noted that there was no sign of physical violence on the applicant's body.

8. The applicant alleged that he had been subjected to various forms of ill-treatment while in police custody. In particular, he had been beaten, insulted and threatened with death.

9. On 20 March 1999 a report was drafted and signed by two police officers, according to which the applicant refused to make statements, claiming that he was only answerable to the PKK and that he would not give statements to the police and the judiciary of the Republic of Turkey. The applicant refused to sign this report.

10. On 21 March 1999 the applicant underwent four medical examinations. The first of these examinations took place at 10.45 a.m. at the Istanbul branch of the Forensic Medicine Institute. The medical expert, Dr. F.D., observed two scabbed abrasions of 1 x 3 cm and 1 x 2 cm on the applicant's right scapula and a scabbed abrasion of 0,5 x 1 cm on his spine. He further noted that the applicant complained of pain in both ears, in his throat and the subcostal region. The medical expert concluded that the applicant should be referred to a State hospital and examined for the ear pain.

11. The second and third examinations took place at 11.50 a.m. and 12.15 a.m. in the Haseki Hospital. The first doctor who examined the applicant observed two bruises of 1 x 1 cm and 2 x 1 cm on the right scapula. The second doctor, who conducted an examination of the applicant's ears, observed a central perforation of the right eardrum.

12. The applicant was subsequently taken back to the Istanbul branch of the Forensic Medicine Institute, where Dr. F.D. drafted the fourth medical report. The doctor noted two bruises of 1 x 1 cm and 2 x 1 cm on the right scapula, a central perforation of the right eardrum, two scabbed abrasions of 1 x 3 cm and 1 x 2 cm on the applicant's right scapula and a scabbed

abrasion of 0,5 x 1 cm on his spine. The doctor concluded that the applicant should be examined by a board of experts from the Forensic Medicine Institute with a view to establishing whether the perforation of the right eardrum was the result of a trauma.

13. On the same day the applicant made statements before the public prosecutor at the Istanbul State Security Court. He denied the accusations against him and maintained, *inter alia*, that he had been beaten while in police custody. The applicant once again rejected the accusations against him before a single judge at the Istanbul State Security Court and submitted that he had refused to make statements to the police. The judge ordered his detention on remand.

14. On the same day the applicant was placed in Ümraniye Prison.

15. On 22 March 1999 at 3.15 p.m., the applicant was examined by the prison doctor, who observed two brown coloured bruises on the right scapula and a scabbed abrasion on the lumbar region. The doctor further noted that the applicant complained of pain in the lower lumbar region.

B. The applicant's complaint against the General Director of Police and the subsequent developments

16. On 24 and 28 March 1999, articles were published in various newspapers concerning the police operations conducted following the bombing of the shopping centre. The articles cited the applicant as the person who had organised the bombing and that he was a member of the PKK. According to three of these articles, the Istanbul Police Director and the General Director of Police stated that the applicant was the person who had organised the bombing. The Istanbul Police Director also maintained that the applicant had confessed to the offence in question.

17. On 2 August 1999 the applicant's representative lodged a complaint with the Istanbul public prosecutor's office, to be referred to the Ankara public prosecutor's office, against the General Director of Police, N.B., alleging that the latter's statements had violated the applicant's right to be presumed innocent until proved guilty. The applicant's lawyer submitted that on 23 March 1999 the General Director of Police had organised a press conference at which he had announced that the applicant was the organiser of the bombing of the *Mavi Çarşı*.

18. On 30 September 1999 the Ankara public prosecutor issued a decision based on lack of jurisdiction and passed the investigation to the Ministry of the Interior, since N.B. had made the impugned statements during a press conference in relation to the exercise of his functions.

19. On an unspecified date an investigator was appointed who initiated an investigation into the applicant's allegations.

20. On 28 December 1999 the investigator gave a decision regarding the applicant's allegations. The investigator noted that the police headquarters

had informed him that there was no written copy of the statements made by N.B. on 23 March 1999. Nor did video or tape recordings of the press conference exist. However, the police headquarters submitted to the investigator transcriptions of the tape recording and copies of the articles which had appeared in various newspapers. The investigator observed that in certain articles the applicant was mentioned as the organiser of the bombing. He found that there was nothing in the transcripts showing that the former General Director of Police had mentioned the applicant (by name) as the organiser of the bombing. The investigator had taken statements from the applicant, who had reiterated his allegations. He had encountered a witness, the Head of Protocol of the police headquarters, who submitted that he did not remember whether N.B. had mentioned any names and that it was impossible that N.B. had given the applicant's name. The investigator considered that N.B. had exercised his functions by organising the press conference in question and that there was no evidence that he had given the applicant's name as the organiser of the bombing. He finally considered that the newspapers must have had the name of the applicant through their private relations with some junior officers from the police headquarters, and concluded that no measures should be taken against N.B.

C. Criminal proceedings against the police officers

21. On 12 April 1999 the public prosecutor at the Istanbul State Security Court informed the Fatih public prosecutor that the applicant had allegedly been ill-treated while in police custody and requested that an investigation be initiated.

22. On an unspecified date, the Fatih public prosecutor started an investigation into the applicant's allegations of ill-treatment. In the course of the investigation, on 8 June 1999 the public prosecutor took statements from H.G. and M.K., the police officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters, who had questioned the applicant while he had been in custody. The officers maintained that the applicant had attempted to escape when he had been taken to his home for an on-site inspection after his arrest, and a physical struggle had occurred between them. They contended that the injuries on the applicant's body must have occurred during this struggle.

23. On an unspecified date, the Fatih public prosecutor filed a bill of indictment with the Istanbul Assize Court, charging H.G. and M.K. under Article 243 of the Criminal Code. The defendants were accused of torturing the applicant.

24. On 23 September 1999 the Istanbul Assize Court held its first hearing on the merits of the case. On the same day the accused police officers made statements before the court. H.G. submitted that he had not been present during the applicant's arrest. He further contended that after

the applicant's arrest he had learned that there had been a struggle between the arresting officers and the applicant. He finally maintained that he had not inflicted ill-treatment on the applicant during his questioning. M.K. stated that there had been a struggle between police officers and the applicant during the on-site inspection held following the applicant's arrest. He denied the allegation that he had inflicted ill-treatment on the applicant. The applicant was not present during the hearing.

25. On 18 September 2000, the applicant joined the case against the police officers as a civil party (*müdahil*).

26. Between 23 September 1999 and 19 September 2000 the Istanbul Assize Court requested the public prosecutor's office to make the necessary arrangements for the applicant's attendance at the hearings. However, the court received no reply to its orders and the applicant was not brought to the hearings until 27 November 2000.

27. During the hearing of 27 November 2000, the applicant made statements before the assize court. He maintained, *inter alia*, that he had been subjected to various forms of torture and that he could identify the officers who had inflicted ill-treatment on him.

28. Meanwhile, on 8 November 2000 the applicant complained to the Istanbul Assize Court that he had been prevented from attending the hearings of the case against the police officers by the prison staff and security forces. The applicant requested to be given the opportunity to make statements before the first-instance court.

29. On 23 November 2000 the applicant's lawyer lodged a complaint with the Ministry of Justice against the judges sitting on the bench of the Istanbul Assize Court and the Fatih public prosecutor, alleging that the latter had failed to seek the applicant's attendance at the hearings, had taken the accused persons' statements in the applicant's absence and had disregarded the applicant's complaints that he was being prevented from attending the hearings. On 29 August 2001 the Ministry of Justice sent a letter to the applicant's lawyer, stating that no investigation would be carried out into the actions of the judges sitting on the bench of the Istanbul Assize Court or the Fatih public prosecutor.

30. On 23 November 2001, the applicant's lawyer filed another complaint with the Üsküdar public prosecutor's office against the prison staff and the gendarmerie officers responsible for the transport of detainees, alleging that the latter had committed an abuse of office by not taking the applicant to the hearings.

31. On 30 January 2001 the Üsküdar public prosecutor decided not to bring proceedings against the prison staff and the gendarmerie officers, holding that the applicant had stated orally that he did not wish to attend the hearings and that, due to the unrest in prisons at the time, it had not been possible to draft reports containing the applicant's statements.

32. On 30 April 2001 the applicant lodged an objection to this decision.

33. On 13 June 2001 the Kadıköy Assize Court dismissed the objection.

34. During the hearing of 3 May 2001 before the Istanbul Assize Court an identification procedure took place where the applicant identified one of the accused police officers, H.G., as one of the persons who had tortured him. H.G.'s lawyer submitted that the applicant recognised H.G. as they had conducted the on-site inspection together. The applicant replied that he had in fact been arrested on 13 March 1999 in his flat but that the arrest report had been drafted on 14 March 1999. He maintained that there had never been a second on-site inspection and that the apartment had been searched only at the time of his arrest. On the same day, the Istanbul Assize Court also heard two officers who had arrested the applicant. The officers maintained that during the arrest a struggle had occurred between them and the applicant since he had attempted to escape.

35. Meanwhile, on 2 March 2001 the Istanbul Assize Court requested the Forensic Medicine Institute to subject the applicant to a medical examination with a view to determining whether the perforation of the right eardrum was the result of a trauma.

36. On 25 April 2001 the Director of the Forensic Medicine Institute requested that the doctor who had conducted the applicant's medical examination following his detention in police custody draft a report as to whether the perforation was caused by a trauma.

37. On 27 July 2001 the doctor from the Haseki Hospital who had first observed the perforation, B.T., drafted a report which stated that the applicant had not suffered a fresh traumatic perforation.

38. Following the submission of this report to the Istanbul Assize Court, on 28 February 2002 the applicant requested the assize court to obtain the opinion of the Forensic Medicine Institute on the report of 27 July 2001. On the same day, the court dismissed his request, holding that the proceedings had been pending for three years and that the applicant's request was intended to prolong the trial. The court also noted that the report of 27 July 2001 had in fact been asked for by the Forensic Medicine Institute.

39. On 25 April 2002 the Istanbul Assize Court acquitted the accused police officers. In its judgment, the court noted that the medical reports stated that the applicant had suffered injuries. However, it could not be determined where, when and under what conditions the applicant had sustained these injuries. The court further noted that the applicant had received blows when he had attempted to escape during the on-site inspection and considered that the accused police officers had not had the intention to commit an offence.

40. The applicant appealed.

41. On 2 December 2004 the Court of Cassation upheld the judgment of 25 April 2002.

D. Criminal proceedings against the applicant

42. On 13 April 1999 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant and two other persons. The applicant was charged under Article 168 § 2 of the former Criminal Code with membership of the PKK. The bill of indictment did not contain any charge against the applicant concerning the bombing of the *Mavi Çarşı*.

43. On an unspecified date the Fourth Chamber of the Istanbul State Security Court held its first hearing on the merits on the case. The court did not take statements from the applicant and the other accused as they were not brought from the prison.

44. On 18 June 1999 Turkey's Grand National Assembly amended Article 143 of the Constitution and excluded military members from State Security Courts. Following similar amendments made on 22 June 1999 to the Law on State Security Courts, the military judge sitting on the Fourth Chamber of the Istanbul State Security Court hearing the applicant's case was replaced by a civilian judge.

45. On 22 September 1999 the Fourth Chamber of the Istanbul State Security Court heard the applicant and other accused, who challenged the accuracy of the house search, arrest and seizure report. The court decided to secure the testimony of those police officers who had effected the arrest and the house search, and postponed the trial until 8 December 1999.

46. Between 8 December 1999 and 12 June 2000 the first-instance court held two more hearings and postponed the trial as the police officers who had effected the arrest had failed to comply with the summons.

47. On 12 June 2000 the State Security Court requested the Istanbul Assize Court to provide information on the case brought against M.K. and H.G. on the charge of ill-treating the applicant.

48. Between 12 June 2000 and 4 September 2000 the State Security Court held four more hearings and postponed the trial as the arresting officers had not attended the hearings and the Istanbul Assize Court had not sent the requested information.

49. On 4 September 2000 one of the arresting officers appeared before the court and made statements. The State Security Court once again postponed the trial.

50. On 19 March 2001 the first-instance court abandoned the proposal to hear the arresting officers and once again requested the Istanbul Assize Court to provide information on the case before it.

51. On 18 June 2001 the public prosecutor submitted to the court his observations on the merits of the case.

52. From 18 June 2001 until 10 April 2002, the Fourth Chamber of the Istanbul State Security Court postponed the trial as it had not received information about the outcome of the criminal proceedings brought against

H.G. and M.K., and in order to obtain the defence submissions of the applicant and the other accused.

53. On 10 April 2002 the applicant and the other accused made their defence submissions.

54. Between 10 April 2002 and 18 September 2002, the first-instance court postponed the trial as the information concerning the outcome of the proceedings before the Istanbul Assize Court had not been transmitted to it.

55. Throughout the proceedings, the first-instance court considered the applicant's continued detention, either of its own motion or upon the request of the applicant or his lawyer. The court ordered the applicant's continued detention on every occasion, having regard to the state of the evidence, the total length of his detention on remand, the nature of the offence with which he had been charged, and the upper limit of the punishment for that offence. On two occasions the applicant lodged objections to the decisions of the first-instance court of 18 June and 26 September 2001 to prolong his detention, which were eventually dismissed by the Fifth Chamber of the Istanbul State Security Court on 26 June and 5 October 2001 respectively.

56. On 18 September 2002 the Fourth Chamber of the Istanbul State Security Court convicted the applicant of membership of the PKK and sentenced him to twelve years and six months' imprisonment. The first-instance court took into consideration in its judgment, *inter alia*, the document dated 20 March 1999. The court considered that, by refusing to give any information to the police except for the details of his identity, to make statements or to sign the document drawn up by the police officers, the applicant had acted as a member of an illegal organisation. The court further noted that the applicant had participated in a number of demonstrations in support of the PKK and that his fingerprints had been found on the paper used for wrapping two Molotov cocktails thrown into a supermarket on 24 February 1999. The first-instance court also established, in the light of the police statements of one of the accused, V.İ., that the applicant had ordered V.İ. to rent a flat where the police had found several explosives put there by the applicant. Taking into account the length of the applicant's detention on remand and the fact that he was a student and had a fixed domicile, the first-instance court ordered his release from prison.

57. On 21 January 2004 the Court of Cassation upheld the judgment of 18 September 2002 in respect of the applicant.

58. However, in the meantime, on 23 January 2003 the applicant had died.

II. RELEVANT DOMESTIC LAW

59. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 96-100, ECHR 2004-IV (extracts)), and

Çobanoğlu and Budak v. Turkey (no. 45977/99, §§ 29 and 30, 30 January 2007).

THE LAW

I. LOCUS STANDI

60. In their submissions of 8 January 2008, the Government submitted that the applicant's brother could not claim to be a victim within the meaning of Article 34 of the Convention.

61. The Court notes that the applicant died on 23 January 2003 and his brother, Sedreddin Getiren, expressed his wish to pursue the application. It further reiterates that in a number of cases in which an applicant died in the course of the proceedings, it has taken into account the statements of the applicant's heirs or of close family members expressing their wish to pursue the proceedings before the Court (see, among many others, *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999-VI; *Latif Fuat Öztürk v. Turkey*, no. 54673/00, § 27, 2 February 2006; *Mutlu v. Turkey*, no. 8006/02, §§ 13-14, 10 October 2006; and *Hanbayat v. Turkey*, no. 18378/02, § 20, 17 July 2007).

62. In the light of the above, the Court holds that the applicant's brother has standing to continue the present proceedings in the applicant's stead. Consequently, the Government's objection is dismissed. However, Neytullah Getiren will continue to be referred to as the applicant.

II. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

63. The applicant complained that he had been subjected to torture while in police custody and that there had been no adequate investigation into his allegations of ill-treatment in breach of Articles 3 and 13 of the Convention which read as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

64. The Government argued that the applicant had failed to exhaust the domestic remedies available to him, within the meaning of Article 35 § 1 of the Convention. In this connection, they submitted that there were civil and administrative remedies provided by domestic law in respect of persons claiming to be the victims of ill-treatment in police custody and that the applicant could have sought reparation for the harm he had allegedly suffered.

65. The applicant disputed the Government's argument.

66. The Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Karayığit v. Turkey* (dec.), no. 63181/00, 5 October 2004). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned case. The Court therefore rejects the Government's preliminary objection.

67. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The responsibility of the respondent State in the light of the substantive aspect of Article 3 of the Convention

a. The parties' submissions

68. The applicant alleged that he had been subjected to various forms of ill-treatment while in police custody. He submitted, in particular, that he had been beaten, suspended by the arms and immersed in cold water. The police officers had made him lie down and they had walked and jumped on his back. He had received blows to his head, as a result of which his eardrum had been perforated.

69. The Government submitted that the applicant's allegations were unsubstantiated. They maintained that no serious findings of ill-treatment had been noted in the medical reports and that the injuries mentioned in the medical reports of 21 March 1999 must have occurred during the struggle between the applicant and police officers. The Government finally contended that, according to the report of 27 July 2001, the tympanic membrane rupture observed in the medical reports of 21 March 1999 had not occurred in a recent period (paragraph 37 above).

b. The Court's assessment

70. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies, making no provision for exceptions, and no derogation from it is permissible under Article 15 § 2 (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V).

71. It further reiterates that where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are supported by medical reports. Failing this, a clear issue arises under Article 3 of the Convention (see, among many others, *Selmouni*, cited above, § 87, and *Çelik and İmret v. Turkey*, no. 44093/98, § 39, 26 October 2004).

72. In the instant case, the Court observes that the medical reports drawn up on 21 March 1999 showed that the applicant had sustained injuries to his right scapula, spine and lumbar region. They also showed that the applicant had a tympanic membrane perforation in his right ear. The Court notes that the parties did not dispute the findings of the medical reports of 21 March 1999. However, they put forward different versions as to how the applicant had actually sustained them.

73. As regards the abrasions and bruises on the applicant's scapula, spine and lumbar region, the applicant alleged that he had been ill-treated while in custody, whereas the Government alleged that the injuries had occurred during the arrest (see paragraphs 68 and 69 above).

74. The Court observes that according to the arrest report, a physical struggle had indeed occurred between the police officers and the applicant during the arrest as the latter had attempted to escape (see paragraph 6 above). Yet, after his arrest, the applicant was taken to Haseki hospital and examined by a doctor who noted that there was no sign of physical violence on the applicant's person. The Court considers that if the applicant had sustained the injuries noted in the medical reports of 21 March 1999 during the arrest, as alleged by the Government, those injuries should have appeared in the report drawn up on 14 March 1999, the day of the applicant's arrest. The Court further notes that the findings of the medical reports match the applicant's allegations that he had been beaten and that the police officers had inflicted injuries to his back. The Court is therefore not satisfied with the Government's explanations as to how the applicant sustained the abrasions and bruises found on his body.

75. As to the cause of the tympanic membrane perforation observed in the applicant's right eardrum, the applicant claimed to have received blows to his head during his detention in police custody, whereas the Government submitted that the applicant had not sustained that injury in a "recent period" (see paragraphs 68 and 69 above).

76. The Court observes that, according to the medical report drafted on 27 July 2001 by B.T., the doctor who had first observed this injury on the applicant's person on 21 March 1999, the applicant had not suffered a "fresh" traumatic perforation (see paragraph 37 above). In this connection, the Court notes that B.T. did not provide any explanation as to the meaning of the term "fresh" in his report. Nor did the Istanbul Assize Court order him to do so before holding that it could not be determined where, when and under what conditions the injuries noted in the medical report had occurred.

77. In the Court's opinion, the Government also failed to provide a satisfactory explanation of how that injury was caused. They noted only, relying on the medical report of 27 July 2001, that the tympanic membrane perforation had not occurred in a "recent period" without explaining the meaning of this expression and without providing an alternative to the applicant's account of events. Having regard, in particular, to the absence of any injury on the applicant's person on the date of his arrest (see paragraph 7 above) and to the fact that the applicant's allegation that he had received blows to his head corresponded to the nature of the injury, the Court is led to conclude that the tympanic membrane perforation in the applicant's right eardrum occurred when he was detained in the anti-terrorist branch of the Istanbul police headquarters between 14 and 21 March 1999.

78. The Court reiterates that a State is responsible for any person in detention, who is in a vulnerable situation while in its charge and that the authorities have a duty to protect such a person. Bearing in mind the State authorities' obligation to account for injuries caused to persons within their control in custody, the Court considers that the acquittal of the police officers suspected of inflicting ill-treatment cannot absolve the State of its responsibility under the Convention (see *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 33, 8 January 2004, and *Yavuz v. Turkey*, no. 67137/01, § 42, 10 January 2006).

79. In sum, considering the circumstances of the case as a whole and in the absence of plausible explanations from the respondent Government, the Court concludes that all injuries noted in the medical reports of 21 March 1999 were the result of the applicant's ill-treatment while he was held in police custody, for which the State bore responsibility.

80. There has accordingly been a violation of Article 3 of the Convention under its substantive limb.

2. The responsibility of the respondent State in the light of the procedural aspect of Article 3 of the Convention

a. The parties' submissions

81. The applicant complained that the Istanbul Assize Court had acquitted the accused officers despite the evidence in the case file and without conducting any further investigation. The applicant further

complained that no disciplinary measures had been taken in respect of the police officers during the criminal proceedings against them.

82. The Government submitted that a prompt and effective investigation had been initiated into the applicant's allegations of ill-treatment, which had resulted in criminal proceedings against two police officers.

b. The Court's assessment

83. The Court reiterates that where an individual raises an arguable claim that he or she has been subjected to ill-treatment by the police or other such agents of the State and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 102; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, § 98; and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

84. The Court further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and be dismissed if convicted (see *Abdulsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

85. In the present case, the Court notes that the applicant raised his allegation of ill-treatment before the national authorities. Subsequently, upon the request of the public prosecutor at the Istanbul State Security Court, the Fatih Public Prosecutor initiated an investigation and brought criminal proceedings against two police officers who had been involved in taking the applicant's statements at the police headquarters.

86. Therefore, in the Court's view, rather than examining whether there was a preliminary investigation fully compatible with all the procedural requirements as suggested by the Government (see paragraph 82 above), the issue to be assessed is whether the judicial authorities were determined to sanction those responsible (*Türkmen v. Turkey*, no. 43124/98, § 55, 19 December 2006).

87. During the trial, the Istanbul Assize Court heard the accused officers, the applicant and two arresting officers and held an identification procedure during which the applicant identified one of the accused officers as one of the persons who had inflicted ill-treatment on him. The first-instance court further ordered a medical opinion from B.T., the doctor who had observed a tympanic membrane rupture in the applicant's ear on 21 March 1999.

88. Nonetheless, the Court observes that there were serious shortcomings in the way the trial was conducted. Firstly, as indicated above, B.T. considered that the injury was not “fresh” without providing any explanation as to the meaning of the term “fresh” and the Istanbul Assize Court failed to order him to do so before holding that it could not be determined when and under what conditions the injuries had occurred.

89. Furthermore, the Istanbul Assize Court failed to take into account the obviously contradictory statements made by the accused police officers, H.G. and M.K., regarding the origin of the applicant’s injuries. On 8 June 1999 both officers stated to the Fatih public prosecutor that the injuries on the applicant’s body had occurred during the struggle between them and the applicant when the latter had attempted to escape during an on-site inspection conducted after his arrest. During the trial, however, H.G. submitted that he had not been present during the applicant’s arrest and that, after his arrest, he had learned that there had been a struggle between the arresting officers and the applicant. M.K. stated that there had been a struggle between police officers and the applicant during the on-site inspection held following the applicant’s arrest.

90. The Court is particularly struck by the fact that in its judgment acquitting the police officers, the Istanbul Assize Court noted that the applicant had received blows during the on-site inspection whereas there is no document in the case file showing that this on-site inspection had actually taken place.

91. In sum, the Istanbul Assize Court failed to establish the material circumstances and to address the questions put before it, particularly the origin of the injuries found on the applicant’s person at the end of his detention in police custody.

92. Last but not least, the accused police officers continued their professional activities until the end of the proceedings brought against them. In the opinion of the Court, the failure of the domestic authorities to suspend these officers from duty during the investigation and the trial is contrary to the principles enunciated in its jurisprudence (see, among others, *Abdulsamet Yaman*, cited above, § 55, and *Zeynep Özcan v. Turkey*, no. 45906/99, § 44, 20 February 2007).

93. In the light of the foregoing, the Court finds that the criminal proceedings brought against H.G. and M.K. cannot be described as adequate, and were therefore in breach of the States’ procedural obligations under Article 3 of the Convention.

94. It follows that there has been a violation of Article 3 under its procedural limb.

95. In the circumstances of the case, the Court does not consider it necessary to examine separately the applicant’s allegation under Article 13 of the Convention (see *Timur v. Turkey*, no. 29100/03, § 40, 26 June 2007; *Onay v. Turkey*, no. 31553/02, § 41, 20 September 2007).

III. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION CONCERNING THE APPLICANT'S DETENTION IN POLICE CUSTODY

96. The applicant complained under Article 5 §§ 1, 2 and 3 and Articles 13 and 14 of the Convention that his arrest had not been based on any reasonable suspicion, that he had not been informed of the reasons for his arrest and that he had not been brought promptly before a judge or other officer authorised by law to exercise judicial power following his arrest.

97. The Court considers that these complaints should be examined from the standpoint of Article 5 §§ 1, 2 and 3 of the Convention and reiterates that, pursuant to Article 35 § 1 of the Convention, the Court may only deal with the matter within a period of six months from the date on which the final decision was taken. In the absence of domestic remedies, the six-month period runs from the date of the act complained of.

98. The Court observes that the applicant's detention in police custody began on 14 March 1999 and ended on 21 March 1999, when the judge ordered his detention on remand (see paragraph 13 above). The applicant introduced his application with the Court on 23 January 2003, more than six months later (see *Sacettin Yıldız v. Turkey* (dec.), no. 38419/02, 9 May 2006).

99. It follows that this part of the application has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLES 5 AND 13 OF THE CONVENTION CONCERNING THE APPLICANT'S DETENTION ON REMAND

A. Alleged violation of Article 5 § 3 of the Convention

100. The applicant submitted that he had been detained on remand for an excessive length of time in breach of Article 5 § 3 of the Convention, which read as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

1. Admissibility

101. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that

it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a. The parties' submissions

102. The applicant alleged that the grounds given by the Istanbul State Security Court for his continued detention on remand had been insufficient.

103. The Government submitted that the applicant's detention had been based on the existence of reasonable grounds of suspicion of his having committed an offence, and that the custodial measure had been reviewed periodically by the competent authority. They further pointed out that the offence with which the applicant was charged was of a serious nature, and that his continued detention was necessary to prevent crime, to preserve public order and to eliminate the risk of the applicant's absconding.

b. The Court's assessment

104. The Court notes that in the instant case the period to be taken into consideration began on 14 March 1999, when the applicant was taken into police custody, and ended on 18 September 2002, when the applicant was convicted by the State Security Court. It thus lasted three years and six months.

105. The Court further notes from the material in the case file that the State Security Court considered the applicant's detention at the end of every hearing. On each occasion it extended that detention using identical, stereotyped terms, such as "the state of the evidence, the total length of the detention, the nature of the offence with which the accused was charged, and the upper limit of the punishment for that offence".

106. The Court considers that, in general, the expression "the state of the evidence" may be a relevant factor for the existence and persistence of serious indications of guilt. The Court further acknowledges the seriousness of the offence with which the applicant was charged and the severity of the sentence which he faced if found guilty. In this respect, the Court agrees that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding (see *Michta v. Poland*, no. 13425/02, § 49, 4 May 2006). However, in the Court's view, neither the state of evidence nor the gravity of the charges can by themselves serve to justify a length of preventive detention of over three years and six months (see *Çetin Ağdaş v. Turkey*, no. 77331/01, § 28, 19 September 2006; *Mehmet Yavuz v. Turkey*, no. 47043/99, § 39, 24 July 2007).

107. In this connection, the Court observes that the Diyarbakır State Security Court failed to indicate to what extent the applicant's release would have posed a risk after the passage of time, in particular in the later stages of

the proceedings (see *Demirel v. Turkey*, no. 39324/98, § 60, 28 January 2003). Furthermore, the first-instance court never gave consideration to the application of a preventive measure, such as prohibition on leaving the country or release on bail, other than the continued detention of the applicant (see *Mehmet Yavuz*, cited above, § 40).

108. The foregoing considerations are sufficient to enable the Court to conclude that the length of the applicant's detention, which lasted over three years and six months, given the stereotypical reasoning of the first-instance court, has not been shown to have been justified (see *Çetin Ağdaş*, cited above, § 33).

109. There has accordingly been a violation of Article 5 § 3 of the Convention.

B. Alleged violation of Articles 5 § 4 and 13 of the Convention

110. The applicant complained under Articles 5 § 4 and 13 of the Convention that there had been no effective domestic remedy to challenge the first-instance court's orders for his continued detention.

111. The Court considers that this complaint should be examined from the standpoint of Article 5 § 4 of the Convention alone, which reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

1. Admissibility

112. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a. The parties' submissions

113. The applicant maintained that the procedure for lodging an objection did not provide for an effective control mechanism against unlawful deprivations of liberty.

The Government submitted that there existed a remedy whereby the applicant could object to the decisions ordering his continued detention. They contended that the applicant had actually availed himself of this remedy, foreseen in Articles 297-304 of the former Code of Criminal Procedure. The domestic court had dismissed his objection as it had found that his detention was justified.

b. The Court's assessment

114. The Court observes at the outset that the applicant requested to be released pending trial several times before the Fourth Chamber of the State Security Court, which dismissed all these requests. The trial court therefore had the opportunity to end the applicant's alleged lengthy detention and to avoid or to redress an alleged breach of the Convention (see *Mehmet Şah Çelik v. Turkey*, no. 48545/99, § 26, 24 July 2007).

115. As regards the remedy suggested by the Government, the Court notes that it has already found that this remedy offered little prospect of success in practice and that it did not provide for a procedure that was genuinely adversarial for the accused (see *Koştı and Others v. Turkey*, no. 74321/01, § 22, 3 May 2007; *Bağrıyanık v. Turkey*, no. 43256/04, §§ 50 and 51, 5 June 2007; *Doğan Yalçın v. Turkey*, no. 15041/03, § 43, 19 February 2008).

116. The Court considers that the Government have not put forward any fact or argument in the instant case which would require it to depart from its previous findings.

117. There has accordingly been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1, 2 AND 3 OF THE CONVENTION**A. Allegation under Article 6 § 3 concerning the applicant's right to remain silent and the privilege against self-incrimination**

118. The applicant alleged under Article 6 § 3 of the Convention that he had been forced to make self-incriminatory statements while in police custody where he had been subjected to ill-treatment.

The Court considers that this complaint should be examined under Article 6 § 1 of the Convention, which reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

1. Admissibility

119. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a. The parties' submissions

120. The applicant alleged that he had been coerced, under ill-treatment, to sign a document in police custody which had contained self-incriminatory statements. He further submitted that the Istanbul State Security Court had taken this document into account in its judgment.

121. The Government submitted, in reply, that the Istanbul State Security Court's judgment had not been solely based on the applicant's statements. They contended that there was other evidence against the applicant to convict him. The Government further maintained that the applicant had refused to make statements to the police.

b. The Court's assessment

122. The Court observes, at the outset, that on 20 March 1999 two police officers signed a document according to which the applicant had declared that he would not make statements to them as he was only answerable to the PKK, and that he would not give statements to the police or the judiciary of the Republic of Turkey. The applicant, however, refused to sign this document, a fact which leads the Court to conclude that the applicant wished to remain silent during his detention in police custody.

123. The Court reiterates in this connection that the right to silence and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-...).

124. The Court's task is to examine, in the light of all the circumstances of the case, whether the prosecution made use of the applicant's silence in such a way as to amount to an unjustifiable infringement of the right to silence. In particular, it must be determined whether the applicant has been subjected to compulsion to give evidence and whether the use made of the resulting testimony, or his silence, as the case may be, at his or her trial offended the basic principles of a fair procedure inherent in Article 6 § 1, of which the right not to incriminate oneself is a constituent element (see *Macko and Kozubal' v. Slovakia*, nos. 64054/00 and 64071/00, § 48, 19 June 2007, and *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, § 69).

125. In this connection, the Court notes that it has found a violation of Article 3 of the Convention on account of the treatment that the applicant suffered at the hands of the police during his detention. The Court further notes that the applicant was arrested and detained in relation to a violent terrorist attack on a shopping centre which resulted in the killing of thirteen persons. The Court considers that, in the circumstances of the case, strong inferences can be drawn that the applicant was ill-treated in order to obtain information, in particular, about his suspected involvement in the bombing of the *Mavi Çarşı*. It therefore concludes that the applicant was coerced into making self-incriminatory statements.

126. The Court will next look at the question whether the use made of the applicant's silence by the Istanbul State Security Court breached the requirements of Article 6 § 1 of the Convention. In this connection, it observes that the trial court noted in its judgment that the applicant refused to make statements to the police since he was a member of an illegal organisation and that for the same reason he had refused to sign the document of 20 March 1999 detailing the reasons for his silence.

127. The Court notes that the document of 20 March 1999 contained self-incriminatory statements under the cover of reasons for the applicant's silence. In the Court's view, by finding that the applicant was behaving as a member of an illegal organisation since he had not signed this document, while disregarding the applicant's consistent allegations of ill-treatment, the Istanbul State Security Court regarded the applicant's silence in itself as an indication of his guilt, in breach of the very essence of the right to a fair trial (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, § 48).

128. Furthermore, in the opinion of the Court, without the applicant's signature the document of 20 March 1999 cannot be considered to demonstrate the reasons for which the applicant declined to make statements to the police. Furthermore, according to Article 135 of the former Criminal Code in force at the relevant time, such documents did not have any legal value in the absence of the arrestee's signature. Yet, the Istanbul State Security Court took into consideration the content of the document of 20 March 1999 as if it were the applicant's voluntary statement. Thus, it used evidence without any legal value against the applicant.

129. In the light of the foregoing, the Court concludes that the admission of the document of 20 March 1999 as evidence against the applicant in the criminal proceedings against him, even if it was not decisive in securing his conviction, undermined the applicant's rights to remain silent and not to incriminate himself.

130. It follows that there has been a violation of Article 6 § 1 of the Convention.

B. Allegations under Article 6 §§ 1, 2 and 3 of the Convention concerning the independence and impartiality of the trial court, the lack of legal assistance available to the applicant in police custody and his right to be presumed innocent

131. The applicant alleged under Article 6 § 1 of the Convention that he had not received a fair hearing by an independent and impartial tribunal. In this respect, he pointed out that there had been a military judge sitting on the bench of the Istanbul State Security Court until June 1999 and that the judges of the State Security Courts were attached to the Supreme Council of Judges and Public Prosecutors. The applicant further maintained under Article 6 § 2 of the Convention that he had been presented to the press as a criminal by the Istanbul Police Director and the General Director of Police following his arrest. He finally submitted under Article 6 § 3 of the Convention that he did not have the assistance of a lawyer while in police custody.

132. Having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 6 § 1 of the Convention above (paragraph 130), the Court considers that it has examined the main legal question raised under Article 6 of the Convention. It concludes therefore there is no need to make a separate ruling on the applicant's remaining complaints under this provision (see *Yalçın Küçük v. Turkey* (no. 3), no. 71353/01, § 40, 22 April 2008¹, and *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

133. The applicant alleged under Article 14 of the Convention that he had been discriminated against since the criminal procedures for offences tried before the State Security Court were different from those followed in respect of offences tried in other courts.

The Court notes that it has previously rejected grievances of this kind (see, among many others, *Halis v. Turkey* (dec.), no. 30007/96, 23 May 2002, and *Abidin Doğan v. Turkey* (dec.), no. 67214/01, 7 June 2005). The Court finds no particular circumstances in the instant case which would require departure from its earlier findings.

134. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

135. Article 41 of the Convention provides:

¹ The judgment is not yet final.

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

136. The applicant’s brother claimed 80,000 euros (EUR) in respect of non-pecuniary damage that the applicant had suffered.

137. The Government contested this claim.

138. The Court notes that it has found violations of Articles 3, 5 §§ 3 and 4 and 6 § 1 of the Convention. The Court considers, on the one hand, that the finding of a violation in respect of Articles 5 § 4 and 6 § 1 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant. On the other hand, the Court accepts that non-pecuniary damage suffered on account of the violations of Articles 3 and 5 § 3 of the Convention cannot be compensated solely by the findings of violations. The Court further observes that, since the applicant’s brother was accepted by the Court as his successor in the present proceedings, he is entitled to receive the compensation for non-pecuniary damage which otherwise would have been awarded to the applicant. Making its assessment on an equitable basis, the Court awards the applicant’s brother EUR 11,500 in respect of non-pecuniary damage.

B. Costs and expenses

139. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court.

140. The Government contested this claim on the ground that the applicant’s brother had failed to submit any documents proving those costs.

141. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant’s brother has not substantiated that these costs were actually incurred. Accordingly, it makes no award under this head.

C. Default interest

142. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Sedreddin Getiren has standing to continue the present proceedings in the applicant's stead;
2. *Declares* admissible the complaints concerning the alleged ill-treatment of the applicant during his detention in police custody, the alleged ineffectiveness of the investigation into his ill-treatment, the length of his detention on remand, the alleged lack of a remedy by which he could challenge the lawfulness of his detention on remand and his right to remain silent and the privilege against self-incrimination;
3. *Declares* the remainder of the application inadmissible;
4. *Holds* that there has been a violation of Article 3 of the Convention under both its substantive and procedural limbs;
5. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
6. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
7. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
8. *Holds* that it is not necessary to make a separate ruling on the applicant's other complaints under Article 6 of the Convention;
9. *Holds*
 - (a) that the respondent State is to pay the applicant's brother, Sedreddin Getiren, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 11,500 (eleven thousand five hundred euros), plus any tax that may be chargeable, in respect of the non-pecuniary damage suffered by the applicant, which sum is to be converted into new Turkish liras at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
10. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President